88-689

No. _____

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MILDRED PERRY

PETITIONER

VS.

CAROLE HOWES, Warden, Florence
Crane Women's Correctional Facility,

RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals

LARRY L. ROBERTS P 23844
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5749

QUESTIONS PRESENTED

I-II. HAS PETITONER SHOWN CAUSE AND PREJUDICE FOR THE FAILURE TO OBJECT TO THE METHOD IN WHICH CERTAIN TESTIMONY WAS PRESENTED TO THE JURY, AND TO THE NONTRANSCRIPTION OF THAT TESTIMONY, AND DID PREJUDICE BEFALL PETITIONER WHEN CERTAIN TESTIMONY WAS REREAD TO THE JURY IN DEFENSE COUNSEL'S ABSENCE, WHERE HIS INVESTIGATOR WAS PRESENT, AND COUNSEL AGREED TO THE METHOD USED?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

III. WAS THERE COERCION BY THE TRIAL COURT AND A DENIAL OF PETITIONER'S RIGHT OF CROSS-EXAMINATION WHERE A PROSECUTION WITNESS DECIDED TO INVOKE THE PROTECTION OF THE FIFTH AMENDMENT, AND THE TRIAL COURT INFORMED HIM OF THE PENALTIES FOR PERJURY?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

IV. WAS THE TESTIMONY OF A PROSECUTION WITNESS IMPERMISSIBLY BOLSTERED BY THE FACT THAT SHE HAD BEEN SUBJECTED TO HYPNOSIS, AFTER SHE HAD GIVEN STATEMENTS TO THE POLICE, WHERE THE RECORD DOES NOT SHOW CAUSE AND PREJUDICE FROM THE LACK OF OBJECTION TO THE TESTIMONY?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

V. DID THE CONDUCT OF THE TRIAL PROSECUTOR DENY PETITIONER A FAIR TRIAL OR DUE PROCESS, ESPECIALLY WHERE NO OBJECTIONS WERE MADE TO SPECIFIC INSTANCES OF CLAIMED MISCONDUCT, NOR WERE CURATIVE INSTRUCTIONS REQUESTED?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

VI. WAS PETITIONER DENIED HER RIGHT TO CONFRONT WITNESSES WHEN THE PRELIMINARY EXAMINATION TESTIMONY OF ONE WITNESS WAS READ TO THE JURY AND THAT TESTIMONY CONTAINED QUESTIONS AND ANSWERS REGARDING COMMUNICATIONS BETWEEN THE CODEFENDANT AND THE NONTESTIFYING WITNESS, AND NO OBJECTION WAS MADE TO THE PROCEDURE EITHER AT TRIAL OR THE EXAMINATION?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

VII. WHERE THE JURY INDICATED THEY WISHED THE TESTIMONY OF SEVERAL WITNESSES READ TO THEM, AND THE TRIAL JUDGE EXPLAINED THE PROBLEMS WITH THAT REQUEST BUT DID NOT FORECLOSE THE READING OF THE TESTIMONY, AND THE JURY DECIDED IT NEEDED ONLY THE TESTIMONY OF ONE WITNESS, DID A DENIAL OF DUE PROCESS OR A FAIR TRIAL OCCUR?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

VIII. HAS PETITIONER SHOWN PREJUDICE IN THE RECORD REGARDING HER CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL?

Petitioner says	"Yes"
Respondent says	"No"
The District Court said	"No"
The Sixth Circuit Court of Appeals said	"No"

TABLE OF CONTENTS

QUESTIONS PRESENTED.....1-7

INDEX OF AUTHORITIES.....8-12

COUNTERSTATEMENT OF FACTS OF THE CASE.....24

ARGUMENT

I-II. PETITIONER HAS NOT SHOWN CAUSE AND PREJUDICE FOR THE FAILURE TO OBJECT TO THE METHOD IN WHICH CERTAIN TESTIMONY WAS PRESENTED TO THE JURY AND TO THE NONTRANSCRIPTION OF THAT TESTIMONY; FURTHER NO PREJUDICE BEFELL PETITIONER WHEN CERTAIN TESTIMONY WAS REREAD TO THE JURY IN DEFENSE COUNSEL'S ABSENCE, WHERE HIS INVESTIGATOR WAS PRESENT, AND COUNSEL AGREED TO THE METHOD USED.....29

TABLE OF CONTENTS

ARGUMENT

III. THERE WAS NO COERCION BY THE TRIAL COURT NOR DENIAL OF PETITIONER'S RIGHT OF CROSS-EXAMINATION WHERE A PROSECUTION WITNESS DECIDED TO INVOKE THE PROTECTION OF THE FIFTH AMENDMENT, AND THE TRIAL COURT INFORMED HIM OF THE PENALTIES FOR PERJURY.....42

IV. THE TESTIMONY OF A PROSECUTION WITNESS WAS NOT IMPERMISSIBLY BOLSTERED BY THE FACT THAT SHE HAD BEEN SUBJECTED TO HYPNOSIS, AFTER SHE HAD GIVEN STATEMENTS TO THE POLICE, WHERE THE RECORD DOES NOT SHOW CAUSE AND PREJUDICE FROM THE LACK OF OBJECTION TO THE TESTIMONY....49

TABLE OF CONTENTS

ARGUMENT

V. THE CONDUCT OF THE TRIAL PROSECUTOR DID NOT DENY PETITIONER A FAIR TRIAL NOR DUE PROCESS, ESPECIALLY WHERE NO OBJECTIONS WERE MADE TO SPECIFIC INSTANCES OF CLAIMED MISCONDUCT, NOR WERE CURATIVE INSTRUCTIONS REQUESTED.....58

TABLE OF CONTENTS

ARGUMENT

VI. PETITIONER WAS NOT DENIED HER RIGHT TO CONFRONT WITNESSES WHEN THE PRELIMINARY EXAMINATION TESTIMONY OF ONE WITNESS WAS READ TO THE JURY AND THAT TESTIMONY CONTAINED QUESTIONS AND ANSWERS REGARDING COMMUNICATIONS BETWEEN THE CODEFENDANT AND THE NONTESTIFYING WITNESS, AND NO OBJECTION WAS MADE TO THE PROCEDURE EITHER AT TRIAL OR THE EXAMINATION.....66

TABLE OF CONTENTS

ARGUMENT

VII. WHERE THE JURY INDICATED THEY WISHED THE TESTIMONY OF SEVERAL WITNESSES READ TO THEM, AND THE TRIAL JUDGE EXPLAINED THE PROBLEMS WITH THAT REQUEST BUT DID NOT FORECLOSE THE READING OF THE TESTIMONY, AND THE JURY DECIDED IT NEEDED ONLY THE TESTIMONY OF ONE WITNESS, NO DENIAL OF DUE PROCESS OR A FAIR TRIAL OCCURRED.....72

VIII. PETITIONER HAS NOT SHOWN PREJUDICE IN THE RECORD REGARDING HER CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.....75

RELIEF.....81

INDEX OF AUTHORITIES

CASES — PAGE

Brown v Thompson,
29 Mich 72; ___ NW ___
(1874).....38

Burks v Egeler,
513 F2d 221 (6th Cir. 1975),
cert den 423 US 937 (1975).....39

Bute v Illinois,
333 US 640, 671; 68 S Ct 763; 92
LEd 987 (1947).....38

Chandler v Jones,
813 F2d 773 (6th Cir.1987).....79

Chapman v California,
386 US 18; 87 S Ct 824;
17 L Ed2d 705 (1967).....54

Combs v Tennessee,
530 F2d 695 (6th Cir.1976).....57

Cook v Bordenkircher,
602 F2d 117 (6th Cir. 1979).....62, 63

Cronnon v Alabama,
587 F2d 246 (5th Cir. 1979).....71

Davis v Alaska,
415 US 308; 94 S Ct 1105;
39 L Ed2d 347 (1974) 70

Donnelly v DeChristoforo,
416 US 637; 94 S Ct 1868; 40
L Ed2d 431 (1974) 60, 63

Duffield v City of Detroit,
15 Mich 473; ___ NW ___ (1867).....38

CASES CONTINUED PAGE

DuPree v United States,
606 F2d 829 (8th Cir. 1979).....78

Eaglin v United States,
571 F2d 1069 (9th Cir. 1977), cert den,
435 US 906; 55 L Ed2d 497 (1978).....70

Emmett v Ricketts,
397 F Supp 1025 (ND Georgia, 1975)...53

Gilbert v Parke,
763 F2d 821 (6th Cir. 1985).....36 ,61

Grant v State,
385 P2d 925 (Oklahoma, 1963),
reh den, 1963.....33

Green v Arn,
809 F2d 1257, 1263 (6th Cir.1987)....33

Harding v State,
246 A2d 302 (Maryland, 1968),
cert den, 395 US 949; 23
L Ed 2d 468 (1969).....52, 53

Hockenbury v Sowders,
633 F2d 443 (6th Cir. 1980).....41, 71

Howard v State,
178 SW 506 (Texas, 1915).....34

Jackson v Virginia,
443 US 307; 99 S Ct 2781; 61
L Ed2d 560 (1979) 39

Jones v Estelle 622 F2d 124,
126 (5th Cir. 1980).....63

McQueen v Swenson,
498 F2d 207 (8th Cir. 1974).....78

CASES CONTINUED PAGE

Meeks v Bergen,
749 F2d 322 327 (6th Cir. 1984).....79

Mills v Commonweath,
42 SW 2d 505 (Kentucky, 1931).....34

Ohio v Roberts, 448 US 56, 100
SCT 2531, 65 Ed2d 547 (1980).....71

Oliphant v Koehler,
594 F2d 547 (6th Cir. 1979).....48

People v Alcala,
396 Mich 99; 237 NW2d 475 (1976).....59

People v Aldridge,
47 Mich App 639; 209 NW2d
796 (1973).....47

People v Alexander,
72 Mich App 91; 249 NW2d 307 (1976)..54

People v Armstrong,
100 Mich App 423; 298
NW2d 752 (1980).....79

People v Ashford,
91 Mich App 693; 283 NW2d
830 (1979).....59

People v Auerbach,
176 Mich 23, 43; ___ NW ___ (1913)...38

People v Bailey,
101 Mich App 144; 300 NW2d
474 (1980) 79

People v Blalock,
44 Mich App 336; 205
NW2d 185 (1973).....74

CASES CONTINUED PAGE

People v Burks,
48 Mich App 484; 210 NW2d
495 (1973).....73

People v Carey, 125 Mich 535, 541;
-NW- (1901).....35

People v Carson,
19 Mich App 1; 172 NW2d 211 (1969);
lv den 383 Mich 780 (1970).....38

People v Clyburn,
55 Mich App 454; 458-459; 222
NW2d 775 (1974) 33

People v Crosby,
19 Mich App 135; 172 NW2d
506 (1969) 78

People v Duncan,
402 Mich 1; 260 NW2d 58 (1977).....59

People v Etchison,
123 Mich App 448; 333 NW2d
309 (1983).. 61

People v Farnsley,
94 Mich App 34; 287
NW2d 361 (1979).....54

People v Fell,
65 Mich App 543; 237
NW2d 550 (1973).....67

People v Ferguson,
94 Mich App 137; 288
NW2d 587 (1979).....54

People v Flores,
92 Mich App 130; 284
NW2d 510 (1979).....53

CASES CONTINUED PAGE

People v Foster, 77 Mich App 604, 610; 259 NW2d 153 (1977).....76

People v Fournier, 86 Mich App 768; 273 NW2d 555 (1980).....53

People v Garcia, 398 Mich 250; 247 NW2d 547 (1976).....76, 78

People v Gonzales, 417 Mich 968; 336 NW2d 751 (1983)....55

People v Hampton, 407 Mich 354; 285 NW2d 284 (1979)....39

People v Hanna, 85 Mich App 516; 271 NW2d 299 (1978).....76

People v Harley, 49 Mich App 729; 212 NW2d 810 (1973).....47

People v Hernandez, 80 Mich App 465; 264 NW2d 343(1978) 61

People v Howe, 392 Mich 670; 221 NW2d 350 (1974)....73

People v Iacopelli, 141 Mich App 566, 568; 367 NW2d 837 (1985) 38

People v James, 87 Mich App 412; 274 NW2d 801 (1978).....55

CASES CONTINUED PAGE

People v Johnson,
356 Mich 619; 97 NW2d 739 (1959).....47

People v Kimbrough,
193 Mich 330, 336;
___ NW ___ (1916).....33

People v Krist,
93 Mich App 425; 287 NW2d 251
(1979), lv den 407 Mich 963 (1980)...79

People v Lauzon,
84 Mich App 201; 269
NW2d 524 (1978).....55

People v Malchi White,
81 Mich App 226, 229; 265
NW2d 100 (1978) 78

People v Martin,
210 Mich 13; ___ NW ___ (1920).....77

People v Martin,
75 Mich App 6, 14; 254 NW2d
628 (1977) 76

People v McKinney,
88 Mich App 715; 278
NW2d 728 (1979).....53

People v McLeod,
45 Mich App 332, 334; 206
NW2d 528 (1973) 77

People v Medcoff,
344 Mich 108; 115-116; 73 NW2d
537 (1955) 35

People v Medina,
100 Mich App 358; 298
NW2d648(1980).....67

CASES CONTINUED **PAGE**

People v Modesto,
382 P2d 33 (Cal, 1963).....53

People v Morehouse,
328 Mich 689; 44 NW2d 830 (1950).....33

People v Nixon,
421 Mich 79; 364 NW2d 593,
599 (1984).. 56

People v Perry (On Second Remand),
144 Mich App 420; 375
NW2d 10 (1985).....57

People v Perry,
115 Mich App 533; 321
NW2d 719 (1982).....25

People v Richards,
150 Mich 434; 114 NW 230 (1907).....70

People v Robinson,
101 Mich App 687; 301
NW2d 41 (1980) 79

People v Robinson,
386 Mich 551; 194 NW2d
709 (1972).....55, 67

People v Shipp,
21 Mich App 415; 175 NW2d
529 (1970) 78

People v Smith,
420 Mich 1; 360 NW2d 841 (1984).....70

People v Solomon,
82 Mich App 502; 266
NW2d 453 (1978).....73

CASES CONTINUED PAGE

People v Sorna,
88 Mich App 351; 276
NW2d 892 (1979).....47

People v Swan,
56 Mich App 22; 223
NW2d 346 (1974).....55

People v Wichman,
15 Mich App 110; 166
NW2d 298 (1968).....55

People v Wright,
408 Mich 1; 289
NW2d 1 (1980).....55

Reed v Ross,
468 US 1; 104 S Ct 2901;
82 L Ed2d 1 (1984) 40

Rice v Marshall,
816 F2d 1126 (6th Cir. 1987).....79

Rice v United States,
35 F2d 689 (2d Cir. 1929) cert den
281 US 730; 74 L Ed 1146 (1929).....34

Siverson v O'Leary,
764 F2d 1208 (7th Cir. 1985).....34

State v Jorgensen,
492 P2d 312 (Oregon, 1971).....52

State v McQueen,
244 SE2d 414 (1978).....53

Stirone v United States,
341 F2d 253 (3d Cir 1965); cert den,
381 US 902; 34 L Ed2d 284.....34

CASES CONTINUED PAGE

Strickland v Washington,
466 US 668, 104 S Ct 2052,
80 L Ed2d 674 (1984).....75

Takacs v Engle,
768 F2d 122 (6th Cir. 1985).....34

Thomas v Wyrick,
535 F2d 407 (8th Cir. 1976).....78

Tingue v State,
108 NE 222 (Ohio, 1914).....34

United States v Adams,
581 F2d 193 (9th Cir. 1978),
cert den, 439 US 1006 (1978).....52

United States v Awkard,
597 F2d 667 (9th Cir 1979),
cert den, 444 US 885 (1979).....53

United States v Leon,
534 F2d 667 (6th Cir. 1976).....62, 63

United States v Licavoli,
725 F2d 1040, 1049 (6th Cir. 1984)...74

United States v Miller,
411 F2d 825 (2d Cir, 1969).....52

United States v Narcisco,
446 F Supp 252 (1977).....53

United States v Toney,
440 F2d 590 592 (6th Cir. 1971).....74

CASES CONTINUED PAGE

United States v Young,
470 US 1; 105 S Ct 1038; 84
L Ed2d 1 (1985).....64

Wainwright v Sykes,
433 US 72; 97 S Ct 2497; 53
L Ed2d 594 (1977).....40

Ward v State,
81 SE 130 (Georgia, 1914).....34

Webb v Texas,
409 US 95; 93 S Ct 351; 34
L Ed2d 330 (1972).....48

Whalen v Johnson,
438 F Supp 1198 (D.C. Mich 1977).....71

Wright v Dudley,
8 Mich 115; ___ NW ___ (1860).....38

STATUTES AND OTHER AUTHORITIES PAGE

32 ALR 4th 774.....65

64 ALR 3d 385.....45

92 ALR 3d 442 (1979).....53

Code of Professional Responsibility,
Canon 7.....46

MCL 750.157a; MSA 28.354(1).....24

MCL 750.227b; MSA 28.424(2).....24

MCL 750.316; MSA 28.548.....24

STATUTES AND OTHER AUTHORITIES PAGE

MCL 750.317; MSA 28.549.....24

MCL 769.26; MSA 28.1096.....67

MCL 768.26; MSA 28.1049.....44

COUNTERSTATEMENT OF FACTS OF CASE

Charged with first degree murder, MCL 750.316; MSA 28.548; conspiracy to commit murder, MCL 750.157a; MSA 28.354(1); and felony firearm, MCL 750.227b; MSA 28.424(2), along with Robert Jackson and Michael White for the brutal slaying of her husband Rothbe Elwood Perry, Petitioner was tried by a jury in the Circuit Court for Wayne County, Michigan, the Honorable Horace W. Gilmore presiding; and on January 30, 1980, the jury convicted her of conspiracy to commit murder in the second-degree and second-degree murder, MCL 750.317; MSA 28.549.

On February 11, 1980, the petitioner was sentenced to life imprisonment for the second-degree murder conviction and the conviction for conspiracy to commit murder in the

second-degree. The latter conviction was vacated by the Court of Appeals. See People v Perry, 115 Mich App 533, 536; 321 NW2d 719 (1982).

Rothbe Elwood Perry died of multiple gunshot wounds after he took 10 to 15 minutes to bleed to death. (VI,34-38).*

Prior to the untimely death of Rothbe Perry, the Petitioner, his wife, had been known to point a .22 pistol at him (VII, 44-47) and was unhappy that they were going to be divorced. (VII, 69). In fact the Petitioner was heard to say that she prayed that either the victim or herself died prior to the

---

* refers to volume and page numbers in the trial transcript.

divorce because she could not stand the humiliation of another divorce. (VII, 69-70). Petitioner also said that she would rather see her husband dead than with another woman. (VII, 69). It was known that Claire Miller was in love with the victim and planned to marry him when the divorce was final. (VII, 64-68). The Petitioner had told Claire that she knew that in the Detroit area one could get another eliminated for $600. (VII, 68-69).

The Petitioner also told Christine Brandon, her niece that she was going to have her husband 'beat up.' (X, 21-2). The Petitioner told Christine that she had shown the persons who were to beat up her husband where he worked and what car he drove. (X, 24-25).

After Rothbe was killed, Christine was the witness to some strange phone

calls from "Charles" which frightened the Petitioner. (X, 31-33).

The Petitioner was the beneficiary of two double indemnity $5000 accidental death life insurance policies from Mutual Life Insurance Company which included death from gunshot wounds. (XI, 9-68). Petitioner was also the beneficiary of a life insurance policy from Travelers Insurance Company which in the case of accidental death was worth $57,000. (XV, 27-30)

The Petitioner was also known to have consulted with a 'card reader' to have some voodoo done on her husband, but settled for having him beat up. (XI, 12-25). A letter was received from the Petitioner asking Helen Lohmann (who drove her to the 'card reader') asking her to say that the beating and murder were the idea of Sylvia Perkins the 'card

reader.' (XI, 26-27). Sylvia Perkins said that the Petitioner wanted her to put her in touch with an alleged witch named 'Gundella.' (XII, 12-18).

Petitioner was home at the time her husband was shot and asked neighbors to call the police. (V, 15-22, 23, 31, 120). Right after the shooting, the Petitioner went to the house of Louise Dalip and made some telephone calls, including one to the insurance company. (V, 121-124; VI 9-10).

ARGUMENT

I-II. PETITIONER HAS NOT SHOWN CAUSE AND PREJUDICE FOR THE FAILURE TO OBJECT TO THE METHOD IN WHICH CERTAIN TESTIMONY WAS PRESENTED TO THE JURY AND TO THE NONTRANSCRIPTION OF THAT TESTIMONY; FURTHER NO PREJUDICE BEFELL PETITIONER WHEN CERTAIN TESTIMONY WAS REREAD TO THE JURY IN DEFENSE COUNSEL'S ABSENCE, WHERE HIS INVESTIGATOR WAS PRESENT, AND COUNSEL AGREED TO THE METHOD USED.

A. METHOD OF REREADING:

Chare Knight testified against the Petitioner at the preliminary examination of this cause. At trial, this witness decided not to testify, to assert the Fifth Amendment and to withdraw from his

plea bargain and stand trial. The trial court agreed that he could validly assert the Fifth but that that made him an unavailable witness, thus allowing the People to present to the trial juries the extensive direct and cross-examination of this witness taken at the preliminary examination. This was done. As indicated by Petitioner, the court reporter did not transcribe this reading. The transcript read amounted to about 250 pages.

The trial transcript does, in fact, indicate what was read to the jury during trial.

After the trial court had determined that said examination testimony was admissible, the court and counsel discussed how it would be read to the jury. Mr. Willis, Jackson's counsel, wanted to read his own cross-examination

of Knight and either the prosecutor or the court reporter would read the rest. The prosecutor expressed concern over this possibility (December 13, 1979; 95-98).

On December 18, 1979, the prosecution prepared to present the testimony of witness Chare Knight to the jury, and the trial record shows how that was done. (See transcript of December 18, 1979, pp. 76-77, and 79-80.) More reading of the examination testimony occurred on December 19 and 20. (See transcript, December 19 and 20, pp. 4 and 63, respectively.) There were no objections nor interruptions in the reading of this testimony and both defense counsel agreed with the established format of the reading.

After the prosecution and defense rested, the jury began its deliberations.

They requested that the testimony of Knight be re-read to them.

At no point in the record of the trial does there appear an objection to this procedure posed by either Petitioner or by defense counsel. At no point in this record is there ever any indication, however slight, that the express and explicit instructions of the trial court relating to the re-reading were not followed to the letter by the prosecutor.

It should be noted that although the trial judge was not present during the rereading of the testimony, an investigator employed by defense counsel was, and certainly that investigator knew how and where to reach counsel should that need arise. As the District Court noted, it would have been preferable for the trial court to have remained during that rereading, but no constitutional

infirmity resulted from his absence. See People v Kimbrough, 193 Mich 330, 336; ___ NW ___ (1916), where the Michigan Supreme Court required a showing of prejudice from such a claim; and People v Clyburn, 55 Mich App 454, 458-459; 222 NW2d 775 (1974), where the judge was absent during the reading of the testimony of three witnesses to the jury, and both counsel had agreed to his absence, and no reversible error was found; People v Morehouse, 328 Mich 689, 692; 44 NW2d 830 (1950). As a matter of state law, concerning evidentiary matters, the lower courts acted properly in handling this issue. (For other cases which deal with the issue of absence of counsel, see Green v Arn, 809 F2d 1257, 1263 (6th Cir. 1987), where it was recognized that a harmless error analysis was applicable in some instances where trial counsel was absent during a trial;

and Takacs v Engle, 768 F2d 122 (6th Cir. 1985), absence of counsel at preliminary hearing harmless error; and Siverson v O'Leary, 764 F2d 1208 (7th Cir. 1985), pointing out that counsel should take sufficient precautions to protect his client's interests if counsel is going to be absent at trial.)

Authority in several other states and federal jurisdictions is in accord. Howard v State, 178 SW 506 (Texas, 1915); Rice v United States, 35 F2d 689 (2d Cir. 1929) cert den 281 US 730; 74 L Ed 1146 (1929); Tingue v State, 108 NE 222 Ohio, 1914); Mills v Commonweath, 42 SW 2d 505 (Kentucky, 1931); Ward v State, 81 SE 130 (Georgia, 1914); Stirone v United States, 341 F2d 253 (3d Cir. 1965); cert den, 381 US 902; 34 L Ed2d 284; Grant v State, 385 P2d 925 (Oklahoma, 1963); reh den, 1963.

Of equal importance here is the definition of the word "trial"; as Petitioner's assertions rest heavily on this point.

> To be sure when considering what is the "trial" for purposes of this question we can exclude formal and preliminary matters or matters occurring after the hearing on the merits or rendition of the verdict, as well as other matters. See Snyder v Massachusetts, supra; generally, 26 ALR2d 762, 770; 150 ALR 764; 144 ALR 199; 23 ALR2d 456; 96 ALR 508, 515; 70 ALR 1072. This Court has held that the accused need not be present when the jury, after having departed to deliberate, returns and requests a reiteration of instructions, People v LaMunion, People v Carey, 125 Mich 535. . . . (emphasis added).

People v Medcoff, 344 Mich 108, 115-116; 73 NW2d 537 (1955).

Thus, if the accused need not be present at a re-reading of testimony, and if defense counsel may validly waive his right to be there, and if there is no objection to the absence of the judge at the re-reading, there is no appealable

issue as there is no error.

Petitioner, by not objecting to the procedure now complained of, has waived her right to seek further review, not having shown cause or prejudice for the noncompliance with the state contemporaneous objection rule. Gilbert v Parke, 763 F2d 821, 825 (6th Cir. 1985).

B. LACK OF TRANSCRIPTION:

Petitioner's claim contends that the transcript of the trial proceedings does not contain sufficient evidence of proof of the charge of second degree murder, under state law, because the preliminary examination testimony of witness Chare Knight, read into evidence because the prosecution witness asserted his Fifth Amendment rights and was thus unavailable, was not transcribed by the

court reporter, although clearly it had been transcribed from the preliminary hearing. (See the District Court's opinion and order, p. 3.) Petitioner also contends that she was somehow denied her right to a meaningful appeal because several tape recordings were played to the jury and not transcribed verbatim.

It should be noted that not only was there no objection made to the failure of the court reporter to transcribe the previously recorded testimony of the preliminary hearing, but that no request was made for the production of the tapes, nor was there any request made for a transcription of the tapes. Petitioner's claims ignore the presumption of regularity in court proceedings and argues as if the opposite were the rule: that the proceedings were presumably incorrect and contained reversible error unless they can be

shown to be contrary. That is not the law, and has been so stated in Michigan. See People v Iacopelli, 141 Mich App 566, 568; 367 NW2d 837 (1985); People v Carson, 19 Mich App 1; 172 NW2d 211 (1969); lv den 383 Mich 780 (1970); People v Auerbach, 176 Mich 23, 43; ___ NW ___ (1913); and see Bute v Illinois, 333 US 640, 671; 68 S Ct 763; 92 LEd 987 (1947).

The basis of Petitioner's assertion is faulty for it does not include the actual definitional parameters of the record on appeal. Michigan Court Rule 7.210, formerly GCR 1963, 811.1; Wright v Dudley, 8 Mich 115; ___ NW ___ (1860); Duffield v City of Detroit, 15 Mich 473; ___ NW ___ (1867); and Brown v Thompson, 29 Mich 72; ___ NW ___ (1874) explain that the record on appeal consists of the court file, all motions and papers contained in that file, and all decisions

of the court, plus all transcripts and exhibits. Since the transcript of the examination testimony of witness Knight is and was extant, it was part of the record on appeal, and was considered by the state courts during Petitioner's state appeal of right. Thus, the point about the present record being insufficient to support the guilty verdict fails, and no analysis per Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed2d 560 (1979); People v Hampton, 407 Mich 354; 285 NW2d 284 (1979) as to sufficiency of the evidence need be done.

As regards the tapes and the nontranscription of their contents in the trial record, one was admitted through the efforts of counsel for a codefendant, and counsel for Petitioner did not object to the admission nor playing of the other tapes. Further, any tapes which were

defense exhibits and were played only to the jury for codefendant Jackson can not be attacked by Petitioner, since she manifestly has no standing to claim error given that context.

There has been no showing of prejudice to Petitioner from the nontranscription of the tapes or the examination testimony. To reap the benefit of a claim of violation of constitutional rights, Petitioner has to show prejudice, and her bald assertions here should be disregarded. Since she has not shown cause for the lack of objections to the now-claimed errors, she cannot prevail. See Reed v Ross, 468 US 1; 104 S Ct 2901; 82 L Ed2d 1 (1984); Wainwright v Sykes, 433 US 72; 97 S Ct 2497; 53 L Ed2d 594 (1977), upholding the validity of a state's contemporaneous

objection rule as to the admission of evidence in a state trial, and requiring the convicted defendant to show cause and prejudice as to the lack of a timely objection before habeas review might be allowed; and Hockenbury v Sowders, 633 F2d 443 (6th Cir. 1980).

III. THERE WAS NO COERCION BY THE TRIAL COURT NOR DENIAL OF PETITIONER'S RIGHT OF CROSS-EXAMINATION WHERE A PROSECUTION WITNESS DECIDED TO INVOKE THE PROTECTION OF THE FIFTH AMENDMENT, AND THE TRIAL COURT INFORMED HIM OF THE PENALTIES FOR PERJURY.

As is indicated from even a cursory reading of applicable transcript pages, the situation regarding Knight was very sensitive. He had originally been offered a plea bargain and sentence recommendation in exchange for his testimony at the preliminary examination and trial. Prior to Petitioner's trial, Knight indicated that he wanted to withdraw his plea, assert his Fifth Amendment right to silence, and stand trial as charged. Knight then indicated he would testify at Petitioner's trial.

One other part of the plea bargain assumes relevance here - if for any reason the plea bargain fell through, none of Knight's testimony at Petitioner's examination or any statements he made to police could be used against him at his trial.

In light of these special circumstances, it is fully consonant with reality and common sense to anticipate with full justification that were Knight to testify at Petitioner's trial he would lie.

The trial court was well aware of all of this and, in an attempt to ensure that justice would not be subverted and that the possibility of ascertaining the truth would be enhanced, decided to inform Knight about possible perjury penalties. The trial court, exercising its superintending control powers over

the trial could be expected to do no less. Indeed, were the trial court not to have acted in the manner now challenged, there would have been a great likelihood that justice would have been grossly subverted. The trial court's conduct was not only not improper, it was commendable.

Petitioner then asserts that the action of the trial court denied the right of cross-examination of Knight when his preliminary examination testimony was read to the jury during trial. This disregards the fact that when Knight re-asserted his Fifth Amendment rights, he became an unavailable witness (and was declared to be such by the court) thus allowing his prior testimony to be admitted. MCL 768.26; MSA 28.1049. Knight had been fully cross-examined at the preliminary examination, 200-250 pages worth. (December 13, 1979: 92).

The record does not support Petitioner's assertions that the court exerted duress on Knight. It does reveal that the court repeated warnings already given to Knight by his own attorney.

The proper context of the now challenged action does not reveal error.

Knight's own counsel informed the court that Knight had changed his mind and would not testify at trial; and that based on this attorney's knowledge, he could no longer ethically represent Knight. (See Transcript, December 17, 1979, pp 77-78).

See also, "Rights and Duties of Attorney in Criminal Prosecution Where Client informs Him of intention to Present Perjured Testimony," 64 ALR 3d 385.

Counsel then indicated he had explained perjury concepts to Knight. The court then informed Knight in the manner now challenged.

Knight's counsel acted in complete conformity with the Code of Professional Responsibility, Canon 7, "A lawyer should represent a client zealously within the bounds of the law."

Special reference must be made to the court's expressed reasons for informing Knight as it did. (December 17, 1979: 81-83).

It is well established that the trial court has a duty to control trial proceedings before it and in the effective administration of justice. "The fundamental purpose of a criminal trial is the fair ascertainment of the

truth." People v Johnson, 356 Mich 619; 97 NW2d 739 (1959); People v Aldridge, 47 Mich App 639; 209 NW2d 796 (1973); People v Sorna, 88 Mich App 351; 276 NW2d 892 (1979).

The court has a duty to prevent the perpetration of a fraud on the court and the jury, such is exactly what it did here.

There is no error here as there was no attempt to pervert the "ends of justice" by the court's actions. People v Harley, 49 Mich App 729; 212 NW2d 810 (1973).

Additionally, neither counsel objected to the jury being told that Knight's testimony was being read to them because he took the Fifth Amendment. (December 13, 1979: 97-98). No objection, no error.

The trial court's actions in handling this issue as he did were entirely proper, and were not an abuse of discretion. Oliphant v Koehler, 594 F2d 547 (6th Cir. 1979). And, since the context here was markedly different from that in Webb v Texas, 409 US 95; 93 S Ct 351; 34 L Ed2d 330 (1972), the trial court in this cause did not prevent the witness from testifying. Where the record shows that the witness was "mercurial", as characterized by the District Court, it was appropriate for the trial court to have warned him of the penalties for perjury.

IV. THE TESTIMONY OF A PROSECUTION WITNESS WAS NOT IMPERMISSIBLY BOLSTERED BY THE FACT THAT SHE HAD BEEN SUBJECTED TO HYPNOSIS, AFTER SHE HAD GIVEN STATEMENTS TO THE POLICE, WHERE THE RECORD DOES NOT SHOW CAUSE AND PREJUDICE FROM THE LACK OF OBJECTION TO THE TESTIMONY.

Petitioner objects to the admission of testimony at trial relating to the pre-trial hypnosis of one prosecution witness, Christine Brandon. Petitioner asserts that the hypnosis was undertaken to bolster the credibility of her testimony to the jury. Petitioner continues to make this allegation notwithstanding that this witness had no difficulty recalling events and testified that she underwent hypnosis <u>after</u> having given two statements to police and that

said hypnosis did not alter the earlier made statements.

Petitioner states that Brandon's testimony should not have been admitted at all, that her testimony was impermissibly tainted by suggestions implanted during the hypnosis, and that because of the hypnosis Petitioner had no effective cross-examination rights. Petitioner also asserts that the "bolstering" took place when the court allowed the prosecutor to ask the witness whether she had undergone hypnosis.

Brandon testified on two different dates. (December 12, 1979: 82-87; December 17, 1979: 21-41 direct exam; December 17, 1979: 41-50, Campbell, cross-examination; December 17, 1979: 53-70, Willis, Cross-examination). Campbell, Petitioner's attorney, did not raise any question about hypnosis

although Willis, counsel for the codefendant did.

Both trial counsel then waived the presence and testimony of the hypnotist.

What this record reveals is simply that there was no objection from defendant's counsel as to testimony relating to any hypnosis, that there was no cross-examination by counsel on this point, and that there was no real cross-examination by Willis. Not only that, but the possibility for suggestive implantation of events is nil - the witness had already given statements to police prior to being hypnotized and her statements did not alter after it.

Here, the only purpose of the hypnosis, as argued by the prosecutor in closing argument, was to firm up possible dates on which certain conversations had

taken place. That the conversations had taken place, that the information conveyed during those conversations had been presented by the witness to police prior to the hypnosis, and that the witness' testimony did not change after the hypnosis - i.e. there were no prior inconsistent statements to be "corrected" as in Hangsleben, cited by Petitioner shows beyond doubt that the concerns of the Hangsleben court which there prevented admissibility not, and legally should not, be found to apply here.

There are several cases which have found that such evidence and testimony is admissible. For example, United States v Miller, 411 F2d 825 (2d Cir, 1969); United States v Adams, 581 F2d 193 (9th Cir. 1978), cert den, 439 US 1006 (1978); State v Jorgensen, 492 P2d 312 (Oregon, 1971); Harding v State, 246 A2d 302 (Maryland, 1968), cert den, 395 US

949; 23 L Ed 2d 468 (1969); Emmett v Ricketts, 397 F Supp 1025 (ND Georgia, 1975); United States v Awkard, 597 F2d 667 (9th Cir 1979), cert den, 444 US 885 (1979); People v Modesto, 382 P2d 33 (Cal, 1963); See especially: "Admissibility of Hypnotic Evidence," 92 ALR 3d 442 (1979). See, also, State v McQueen, 244 SE2d 414 (1978) and United States v Narcisco, 446 F Supp 252 (1977).

As is well recognized, decisions of the trial court regarding the admissibility of evidence will not be disturbed on appeal or in post-conviction hearings unless they are clearly erroneous. People v McKinney, 88 Mich App 715; 278 NW2d 728 (1979); People v Flores, 92 Mich App 130; 284 NW2d 510 (1979); People v Fournier, 86 Mich App 768; 273 NW2d 555 (1980).

As indicated above, Petitioner's counsel did not object to any of the questions posed by the prosecutor, which were themselves very limited in nature and scope. Where there is no objection, the issue is not preserved for appellate review. People v Farnsley, 94 Mich App 34; 287 NW2d 361 (1979); People v Ferguson, 94 Mich App 137; 288 NW2d 587 (1979); People v Alexander, 72 Mich App 91; 249 NW2d 307 (1976).

Furthermore, both counsel waived production of the hypnotist (December 17, 1969: 75).

Even if admission were held to be error, and on the special and unique facts here it was not, the error would on these facts be harmless in light of those special facts and the other evidence adduced against Petitioner. Chapman v California, 386 US 18; 87 S Ct 824; 17 L

Ed2d 705 (1967);People v Swan, 56 Mich App 22; 223 NW2d 346 (1974); People v Robinson, 386 Mich 551; 194 NW2d 709 (1972); People v Wright, 408 Mich 1; 289 NW2d 1 (1980); People v Wichman, 15 Mich App 110; 166 NW2d 298 (1968); People v Lauzon, 84 Mich App 201; 269 NW2d 524 (1978) and People v James, 87 Mich App 412; 274 NW2d 801 (1978).

Because the scope of the question presented here was not determined adversely to Respondent by the Michigan Supreme Court in People v Gonzales, 417 Mich 968; 336 NW2d 751 (1983), with the state court explaining: This opinion should not be read as determining the question of the admissibility of this witness's testimony concerning facts she was able to recall and relate prior to hypnosis, a question which is reserved until raised on an adequate record in an appropriate case, the facts that here the

witness had given statements to the police, and in testimony, recounted those statements did not lead the reviewing state courts to hold the admission of her testimony to be error. "(T)he fact that a prosecution witness has been hypnotized does not automatically preclude effective cross-examination". People v Nixon, 421 Mich 79; 364 NW2d 593, 599 (1984).

Further, under the peculiar facts of this matter, the issue should be viewed as a state law evidentiary question which is not reviewable in federal habeas proceedings. Burks v Egeler, 513 F2d 221 (6th Cir. 1975), cert den 423 US 937 (1975). Since there was corroboration of the witness's testimony by three other witnesses, any error would

have been harmless. See People v Perry (On Second Remand), 144 Mich App 420, 422; 375 NW2d 10 (1985). A federal constitutional question has not been presented, even if it were held that the lower state appellate court was incorrect in its holding. Combs v Tennessee, 530 F2d 695 (6th Cir. 1976).

V. THE CONDUCT OF THE TRIAL PROSECUTOR DID NOT DENY PETITIONER A FAIR TRIAL NOR DUE PROCESS, ESPECIALLY WHERE NO OBJECTIONS WERE MADE TO SPECIFIC INSTANCES OF CLAIMED MISCONDUCT, NOR WERE CURATIVE INSTRUCTIONS REQUESTED.

Petitioner challenges several aspects of the trial prosecutor's initial closing argument and rebuttal closing argument.

She claims that these comments were equivalent to the prosecutor testifying; vouching for witnesses; telling the jury that his own witnesses were lying and, amounted to an accusation that Petitioner coerced a witness into refusing to testify.

The short answer to these allegations is that the initial argument now challenged was totally allowable as comment on the evidence adduced at trial, and/or were statements representing the prosecutor's theory of the case. This does not represent error. (January 28: 71-75).

Several now challenged comments were not challenged at trial and thus, are not preserved for review. People v Duncan, 402 Mich 1; 260 NW2d 58 (1977); People v Alcala, 396 Mich 99; 237 NW2d 475 (1976).

The rebuttal closing argument challenged was clearly responsive to defense closing argument and is thus also not error. People v Ashford, 91 Mich App 693; 283 NW2d 830 (1979). See especially defense counsel's comments,

January 28: 44, 48; January 28: 53, 54, 55.

The relevant question to be asked when this issue is raised and review is sought is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process". Donnelly v DeChristoforo, 416 US 637; 94 S Ct 1868, 40 L Ed2d 431 (1974). Furthermore, the appropriate standard of review for such a claim is the "narrow one of due process, and not the broad exercise of supervisory power". Donnelly, supra, at 416 US 642.

The challenged remarks in the prosecutor's initial closing argument were legitimate comments on the evidence and proper statements of the prosecutor's theory of the case. Moreover, several of the now challenged comments were not

challenged at trial, as indicated. Although the Michigan courts did not specifically rely on procedural default on this issue, Michigan law requiring an objection and request for curative instruction, see People v Hernandez, 80 Mich App 465; 264 NW2d 343 NW2d (1978) and People v Etchison, 123 Mich App 448; 333 NW2d 309 (1983), the reviewing courts dealt with it in a summary fashion. Therefore, this Court should find that the "cause and prejudice" standard applies. Gilbert v Parke, 763 F2d 821, 825 (6th Cir. 1985).

As the Sixth Circuit Court of Appeals has recognized, the scope of review over allegedly prejudicial arguments by a state prosecutor is narrow. To present a federal constitutional question, the "prosecutorial argument must be so egregious as to render the entire trial

fundamentally unfair". Cook v Bordenkircher, 602 F2d 117, 119 (6th Cir. 1979). In another case, United States v Leon, 534 F2d 667, 679 (6th Cir. 1976), the same court stated that "in every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused: whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused". In Leon, although the prosecutor called the defendant worse than all of the criminals and traitors in hell, and said that he (defendant) was trying to forge and steal justice by conning the jury with a made-up story, the court held defendant was not denied a fair trial. They explained that the remarks were improper, but that there was no objection, which was a significant

consideration, and there was no claim of inadequate counsel. Further, the proof of guilt was overwhelming.

In some respects, the situation here was the same as in Leon, above. Allegations of specific prosecutor misconduct have been made, no objection was raised at the state trial to them, and the competent proofs as to guilt were strong. (See facts.) Respondent submits that if all claimed errors by the prosecutor were established, the sum effect still would not be a denial of due process. As argued earlier, each was and is defensible, and if error, should have been objected to. Because they did not infect the entire proceeding to the detriment of fundamental fairness, in this petition for review, they cannot be said to be error requiring the granting of the writ. Leon, Jones, Donnelly, and Cook, supra.

Finally, the United States Supreme Court, in United States v Young, 470 US 1; 105 S Ct 1038; 84 L Ed2d 1 (1985), addressed the same issue, prosecutor's comments, and held, in pertinent part, that "... a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial". Young, 84 L Ed2d 9-10. "...(T)he Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly". Young, ibid. Here, as pointed out above, the claimed erroneous comments by the prosecutor did not detract from the jury's ability to "judge the evidence fairly".

The evidence presented by the prosecution as to the elements of the crimes charged was very strong, see facts, and the lack of contemporaneous objection only serves to underscore the clear lack of merit in the claim of error now formulated. The trial was fundamentally fair, and the problems raised for review do not constitute a violation of any constitutional rights such that the conviction, and all attendant state appellate remedies utilized, should be overturned. (For an annotated collection of cases on the subject of waiver of the right to complain of error as regards failure to object to improper questions or comments by a prosecutor, see 32 ALR 4th 774 et seq.)

VI. PETITIONER WAS NOT DENIED HER RIGHT TO CONFRONT WITNESSES WHEN THE PRELIMINARY EXAMINATION TESTIMONY OF ONE WITNESS WAS READ TO THE JURY AND THAT TESTIMONY CONTAINED QUESTIONS AND ANSWERS REGARDING COMMUNICATIONS BETWEEN THE CODEFENDANT AND THE NONTESTIFYING WITNESS, AND NO OBJECTION WAS MADE TO THE PROCEDURE EITHER AT TRIAL OR THE EXAMINATION.

Petitioner does not assert that she was denied cross-examination rights vis-a-vis the non-available witness, Chare Knight. She does assert that she was denied cross-examination rights vis-a-vis her codefendant, Robert Jackson (who did not testify before her trial jury) because the testimony of Knight's read to the jury contained questions and

answers relating to communications between Knight and codefendant Jackson relating to the killing.

Petitioner does admit that there was no objection to the reading of this testimony by her counsel. Thus the long established rule, "no - objection, no appeal" applies to bar review of this claim. People v Medina, 100 Mich App 358; 298 NW2d 648 (1980); MCL 769.26; MSA 28.1096; People v Fell, 65 Mich App 543; 237 NW2d 550 (1973); People v Robinson, 386 Mich 551; 194 NW2d 709 (1972).

Petitioner attempts to avoid this problem by finding that said testimony violates the "manifest injustice" or due process standard of appellate review which applies where no objection was made at trial. She does this by asserting that such testimony was not legally admissible against her even at the

preliminary examination bind-over stage and thus most certainly would not be admissible at trial. An objection to this testimony was sustained at the preliminary examination. What Petitioner does not overcome however is the fact that these identical matters were then gone into by her counsel on cross-examination of this witness.

Petitioner's own counsel at the examination thus waived any valid objection she might have had relating to the now-challenged questions and answers. Not only was there a waiver of any potential problem in this area by counsel's examination tactics (and no ineffectiveness claim has ever been brought on this point) but, no trial objection was made - apparently because trial counsel recognized the waiver for what it was. In any event, the trial jury apparently heard (using Petitioner's

appellate scenario) the objection to this testimony and the magistrate's sustaining of it - that would only benefit Petitioner and not hurt her, at least in light of her own theory of this issue on appeal.

In any event, there is no way that Petitioner could have compelled her codefendant to testify before her jury, simply because he was her codefendant. He could not be forced to incriminate himself in violation of his Fifth Amendment rights. Petitioner could not force or even validly request that the People grant her codefendant immunity to testify in her case. In reality, Petitioner would not even <u>want</u> her codefendant to testify - <u>she</u> originated the killing plan, <u>she</u> hired the executioners, <u>she</u> paid them. The codefendant merely "followed orders" as an "employee". His testimony to that

effect would be devastating to any defense she could hope to proffer. There is in actuality no confrontation issue here, but merely a "a straw man" construction being offered on the sacrificial appellate alter in hopes of obtaining some relief where none is legally, factually, or logically required. Davis v Alaska, 415 US 308; 94 S Ct 1105; 39 L Ed2d 347 (1974). Reference should also be made to Eaglin v United States, 571 F2d 1069 (9th Cir. 1977), cert den, 435 US 906; 55 L Ed2d 497 (1978).

As indicated, under state law, Petitioner waived appellate review of this issue by failing to object at the trial court level. See People v Richards, 150 Mich 434; 114 NW 230 (1907); People v Smith, 420 Mich 1; 360 NW2d 841, 844 n. 3 (1984). Additionally, Petitioner has not offered any

explanation for the procedural default which would satisfy any interpretation of the cause and prejudice test. Hockenbury v Sowders, supra.

Since this issue involves a matter of state evidentiary law, which has been ruled upon by the state courts, it is not a federally cognizable claim. Whalen v Johnson, 438 F Supp 1198 (D.C. Mich. 1977); Cronnon v Alabama, 587 F2d 246 (5th Cir. 1979). (See, also, Ohio v Roberts, 448 US 56, 100 SCT 2531, 65 Ed2d 547 (1980), which would allow the introduction of Jackson's earlier statements to witness Knight.)

VII. WHERE THE JURY INDICATED THEY WISHED THE TESTIMONY OF SEVERAL WITNESSES READ TO THEM, AND THE TRIAL JUDGE EXPLAINED THE PROBLEMS WITH THAT REQUEST BUT DID NOT FORECLOSE THE READING OF THE TESTIMONY, AND THE JURY DECIDED IT NEEDED ONLY THE TESTIMONY OF ONE WITNESS, NO DENIAL OF DUE PROCESS OR A FAIR TRIAL OCCURRED.

Petitioner's claim should be carefully read in comparison with the record. Defendant states that the jury wanted Chare Knight's testimony re-read, as well as several other witnesses. The record shows that the trial court indicated to the jury at least twice that if they needed all this testimony re-read it would be done but that there were difficulties in doing so, one of which was providing a reporter to read the

notes of such testimony which had not been transcribed. Petitioner's trial counsel did not pose any objection to this explanation given by the court to the jury. The jury decided they only needed to hear Chare Knight's testimony. This testimony was then re-read.

The scope of the material which is to be re-read does indeed rest in the sound discretion of the trial court. People v Howe, 392 Mich 670; 221 NW2d 350 (1974).

Both the reading of testimony to a deliberating jury and the extent of re-reading are decisions solely within the trial judge's discretion. People v Solomon, 82 Mich App 502; 266 NW2d 453 (1978); People v Burks, 48 Mich App 484; 210 NW2d 495 (1973).

The only request entitled to be considered by the court is that made by the jury, the accused's request need not be considered. People v Blalock, 44 Mich App 336; 205 NW2d 185 (1973).

Under federal law, the decision whether to reread testimony is assigned to the trial judge's discretion. See United States v Toney, 440 F2d 590, 592 (6th Cir. 1971); and United States v Licavoli, 725 F2d 1040, 1049 (6th Cir. 1984). As the District Court held in reviewing this issue, Petitioner Perry was not deprived of any federal constitutional right by the trial court's actions regarding the request for testimony to be reread.

VIII. PETITIONER HAS NOT SHOWN PREJUDICE IN THE RECORD REGARDING HER CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

The District Court succinctly addressed this issue in denying merit to it when he said: Petitioner refers to several segments of the trial where she contends her trial counsel erred. A review of these instances leads the Court to conclude that she woefully has failed to demonstrate that she was deprived of the effective assistance of counsel. Applying the precepts contained in Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984), the Court finds that Petitioner did not show that the purportedly deficient performance of her counsel deprived her of a fair trial. (District Court opinion, p. 8.)

Respondent states that the controlling standard is found in People v Garcia, 398 Mich 250; 247 NW2d 547 (1976):

> Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests undeflected by conflicting considerations.

Our courts have found that new trials will not be granted unless, but for counsel's mistake, the accused would have had a reasonably likely chance of acquittal. People v Martin, 75 Mich App 6, 14; 254 NW2d 628 (1977); People v Foster, 77 Mich App 604, 610; 259 NW2d 153 (1977); and People v Hanna, 85 Mich App 516, 523; 271 NW2d 299 (1978). This is determined from a review of all the evidence presented as well as looking at that conduct of counsel which is alleged to be erroneous and/or prejudicial.

In People v Martin, 210 Mich 13; ___ NW ___ (1920), the court stated most cogently that:

> A careful reading of the brief of defendant's counsel on this motion, as well as that filed when the appeal was submitted, reveals the fact that his principal complaint is that the counsel who acted for defendant at the trial failed to properly defend him and neglected to make objections, put in proofs, and do other things which it is now insisted would have secured his acquittal. Appellate courts cannot determine whether the course pursued by an attorney defending a man charged with crime, in respect to the matters referred to, was the best means of promoting his defense. All who are familiar with trials well know what attorneys frequently differ as to the theory on which a defense to a criminal charge should be presented. (140-141) (emphasis added).

And, as held in People v McLeod, 45 Mich App 332, 334; 206 NW2d 528 (1973):

> Appellate courts never try to second-guess trial counsel on matters of strategy.

See also People v Crosby, 19 Mich App 135, 142; 172 NW2d 506 (1969); People v Shipp, 21 Mich App 415, 420; 175 NW2d 529 (1970); People v Malchi White, 81 Mich App 226, 229; 265 NW2d 100 (1978).

All of the above, and the transcript-revealed actions of Petitioner's counsel, must be viewed in light of the presumption that Petitioner did receive effective assistance of counsel. Thomas v Wyrick, 535 F2d 407 (8th Cir. 1976); DuPree v United States, 606 F2d 829 (8th Cir. 1979); McQueen v Swenson, 498 F2d 207 (8th Cir. 1974).

Petitioner's trial counsel was an attorney with more than "ordinary training and skill" demanded by Garcia, supra. The record reveals a very conscientious attempt to protect Petitioner's interests; there is not even an allegation of any "conflicting

considerations." Petitioner did, in fact and in law, receive effective assistance of counsel. See People v Armstrong, 100 Mich App 423; 298 NW2d 752 (1980); People v Bailey, 101 Mich App 144; 300 NW2d 474 (1980).

The evidence against this Petitioner was such that, even if we assume for argument only, that trial counsel did make one or several "mistakes", there would have been no "reasonably likely chance of acquittal." People v Krist, 93 Mich App 425, 437; 287 NW2d 251 (1979), lv den, 407 Mich 963 (1980); People v Robinson, 101 Mich App 687; 301 NW2d 41 (1980). See Chandler v Jones, 813 F2d 773 (6th Cir. 1987); Meeks v Bergen, 749 F2d 322, 327 (6th Cir. 1984) Compare with Rice v Marshall, 816 F2d 1126 (6th Cir. 1987), and its

discussion of a state's contemporaneous objection rule. The conviction in this cause should be affirmed.

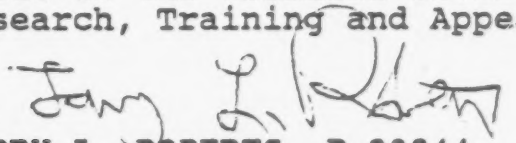
RELIEF

WHEREFORE, Respondent asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney,
County of Wayne

TIMOTHY A. BAUGHMAN,
Chief of the Criminal Division
Research, Training and Appeals



LARRY L. ROBERTS P 23844
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5749

Dated: October 20, 1988
LLR:jjh